85-895 (2)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

Supreme Court, U.S.
FILED
NOV 21 1985
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

RATEPAYERS FIGHT BACK

PETITIONER

V.

MIDDLE SOUTH ENERGY, INC.
ARKANSAS POWER & LIGHT CO.
ARKANSAS PUBLIC SERVICE COMMISSION
ATTORNEY GENERAL OF ARKANSAS

RESPONDENTS

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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November 21, 1985

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UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 84-2409
No. 84-2410
No. 84-2480

Middle South Energy, Inc., and
Arkansas Power and Light
Company,

Appellees,

v.

Arkansas Public Service
Commission; Robert E. Johnston,
Commissioner; Patricia S. Qualls,
Commissioner; and James W. Daniel,
Commissioner; Attorney General of
Arkansas; and Ratepayers Fight Back,

Appellants.

Appeal from the United States
District Court for the
Eastern District of Arkansas

Submitted: April 8, 1985

Filed: August 23, 1985

Before ROSS and JOHN R. GIBSON, Circuit Judges, and MEREDITH,* Senior District Judge.

JOHN R. GIBSON, Circuit Judge.

*The HONORABLE JAMES H. MEREDITH, Senior United States District Judge for the Eastern District of Missouri, sitting by designation.

The issues before us involve a judgment of the district court[1] enjoining the Arkansas Public Service Commission from continuing proceedings to determine whether it should declare void ab initio certain contracts entered into by Arkansas Power and Light Company with respect to the purchase of power from, or payment for construction of, a nuclear power plant located in

[1]The Honorable Henry Woods, United States District Judge for the Eastern District of Arkansas.

Mississippi. The Arkansas Public Service Commission, the Attorney General of Arkansas, and a consumer group called Ratepayers Fight Back argue that the district court erred in finding that the Federal Energy Regulatory Commission has exclusive jurisdiction over the contracts that were the subject of the APSC's proceedings. They further argue that the district court lacked subject matter jurisdiction, that the litigation was not ripe, and that the court abused its discretion by failing to abstain pending the outcome of the state agency proceedings and by granting overbroad relief. We have carefully considered these arguments, and because we believe that the actions threatened by the APSC would burden interstate commerce, we affirm the judgment of the district

court.

The Arkansas Power and Light Company, together with the Louisiana Power and Light Company, the Mississippi Power and Light Company, and New Orleans Public Service, Inc., are wholly-owned operating subsidiaries of Middle South Utilities, Inc. The operating companies provide electric service to wholesale and retail consumers in Arkansas, Louisiana, Mississippi, and Missouri, with an aggregate consumer population of approximately five million people. Planning and operation of the electric generation and transmission facilities needed to meet the demands of the MSU system are performed according to systems agreements. "Transmission and generation functions are so coordinated and integrated as to permit an instan-

taneous transfer of electrical power to any part of Middle South's transmission network." Arkansas Power & Light Co. v. Federal Power Commission, 368 F.2d 376, 378 (8th Cir. 1966). Because the need was seen in the early 1970's to develop additional power generating facilities, Middle South Energy, Inc., also a wholly-owned MSU subsidiary, was created in 1974 to finance, construct, and operate a two-unit nuclear generating plant to be located in Port Gibson, Mississippi and known as the Grand Gulf Nuclear Electric Station.[2] The creation of MSE was necessary because none of the four operating subsidiaries had sufficient resources to finance and construct the nuclear generating plant.

This case involves contracts

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[2]Grand Gulf Unit No. 1 was scheduled to commence commercial operation on July 1, 1985, while the construction of Grand Gulf Unit No. 2

entered into with respect to the financing and construction of the plant, as well as agreements made concerning the sale of the power to be generated. MSE has financed the three billion dollar cost of the first unit by selling common stock to MSU,[3] borrowing from commercial banks, and issuing first

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has been suspended.

[3]MSU is registered under and subject to Securities and Exchange Commission authority by the Public Utility Holding Company Act of 1935. 15 U.S.C. §§ 79 to 79z-6 (1982). These stock sales received SEC approval. Middle South Utilities, SEC Public Utility Holding Co. Act Rel. No. 23,579 (Jan. 23, 1985). In opposing approval of the most recent stock sale, APSC urged that the SEC withhold authorization until AP&L could show compliance with Arkansas law. The SEC rejected this argument, but assured the APSC that the federal securities authorization did not "supersede requirements of state laws as they may eventually be established in respect to AP&L's commitments in the financing of the Grand Gulf project." Id. at 7.

mortgage[4] and pollution control bonds.[5]

In 1974, through a document called the Availability Agreement, MSE obtained from each of the MSU operating companies their commitment to purchase power from the Grand Gulf project. The operating companies agreed to pay MSE, beginning on specific dates, amounts needed for MSE to meet its operating expenses, whether or not the two units of the project were then operating. Payments would be credited to the cost of their future power purchases from MSE. The Availability Agreement has been essen-

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[4]This transaction was approved by the SEC. Middle South Energy, SEC Public Utility Holding Co. Act Rel. No. 23,526 (Dec. 12, 1984).

[5]This transaction was approved by the SEC. Middle South Energy, SEC Public Utility Holding Co. Act Rel. No. 23,495 (Nov. Energy, SEC Public Utility Holding Co. Act Rel. No. 23,495 (Nov. 23, 1984). APSC urged the SEC to withhold approval on the ground that AP&L had not complied with state law. The SEC declined, but noted that the SEC

tial to the financing of the project.[6] Pursuant to a series of ten agreements entered into between 1977 and 1984, MSE has assigned its rights under the Availability Agreement to secure indebtedness in excess of $2.5 billion.[7]

The Availability Agreement initially provided that the share of Grand Gulf power taken by the operating com-

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"does not resolve disputed issues of state law and the order in this case does not prejudice the Arkansas Commission, which may assert its jurisdiction under whatever procedures the state laws permit." Id. at 2 (footnote omitted).

[6]The financing aspects of the original Availability Agreement were approved by the SEC. Middle South Utilities, SEC Public Utility Holding Co. Act Rel. No. 18,437 (June 4, 1974). APSC did not intervene in this proceeding. Its attacks on the agreement in collateral proceedings before the SEC have been rejected. See supra notes 3 & 5.

[7]A number of agreements were executed in which the operating companies agreed that in case of default by MSE they would make payments due under the Availability Agreement directly to

panies would vary relative to their respective needs. In June 1981, the Availability Agreement was amended[8] to fix the allocations of power in these percentages:[9] AP&L - 17.1%; LP&L - 26.9%; MP&L - 31.3%; NOPSI - 24.7%.

On July 28, 1981, MSE and the operating companies entered into a Reallocation Agreement, under which the operating companies agreed to purchase power in the following percentages:

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the banks. In return, the lenders agreed that, should some regulatory agency prohibit the operating companies from making payments under the Availability Agreement, the lenders would make unsecured advances to MSE equal to the amounts it would have received under the Availability Agreement.

[8]The amendment was approved by the SEC. Middle South Energy, Public Utilities Holding Co. Act Rel. No. 22,098 (June 22, 1981).

[9]South Mississippi Electric Power Association, which is not a subsidiary of MSU, owns 10% of the Grand Gulf project. The allocation figures pertain to the 90% share owned by MSE.

AP&L - 0%; LP&L - 38.57%; MP&L - 31.63%; NOPSI - 29.80%.[10] In June 1982, MSE and the operating companies entered into an agreement, the Unit Power Sales Agreement, which required each operating company to purchase the shares of power specified in the Reallocation Agreement. AP&L signed the UPSA but, in accordance with the terms of the Reallocation Agreement, did not agree to purchase any power from the project. The UPSA was filed with the Federal Energy Regulatory Commission for approval as a wholesale power sales agreement.

In February 1984, a FERC administrative law judge rejected the allocation in the UPSA and obligated the operating companies to purchase power from Unit No. 1 as follows: AP&L - 36%;

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[10]This agreement was approved by the SEC. Middle South Energy, Public Utility Holding Co. Act Rel. No. 22,280 (Nov. 18, 1981).

LP&L - 14%; MP&L - 33%; NOPSI - 17%.

The ALJ reasoned that:

> /T/he evidence of Middle South's witnesses is overwhelming that the Middle South system is a single integrated and coordinated electric system operating in Louisiana, Mississippi, Arkansas and Missouri. Planning, construction, and operations are conducted for the system as a whole. Loads on the system are met by centrally dispatching the most economical mix of generators wherever located in the system. Middle South Utilities, Inc. owns the stock of the operating utilities as well as the stock of MSS and MSE. When difficult system decisions have to be made, such as deciding the allocation of Grand Gulf, it is the Board of Directors of Middle South utilities, Inc., that ultimately makes the decision, not an individual subsidiary company or a group of subsidiaries.
>
> The Grand Gulf project was initiated in the 1970's to meet the then projected demand on the Middle South system by

> the end of that decade and not just the load of any Middle South operating company or companies. Constructing generation to meet system load was true of every unit constructed on the Middle South system.
>
> Under these circumstances the costs of Grand Gulf capacity and energy should be shared equitably by MSU's operating companies and their customers.

Middle South Energy, 26 F.E.R.C. ¶ 63,044, at 65,106 (1984), aff'd., 31 F.E.R.C. ¶ 61,305 (1985). The APSC had actively intervened in the proceedings before FERC. It had contended that FERC had no jurisdiction to obligate AP&L to take a share of Grand Gulf and that Arkansas neither wanted or needed the relatively high-cost power from the project. These arguments were rejected.

Approximately one month later, the APSC issued two orders instituting for-

mal inquiries into AP&L's role in the Grand Gulf project. Predicting that Grand Gulf would result in "dramatic [rate] increases" which would place an "intolerable burden" on AP&L's customers and have a "crippling effect" on the Arkansas economy, Arkansas Power & Light Co., Ark. Pub. Serv. Comm'n Docket No. 84-041-OII, at 1 (Mar. 12, 1984), the APSC ultimately sought to "protect the interests of the residential, business, and industrial customers of AP&L and preserve the viability of the economy of the State of Arkansas." Arkansas Power & Light Co., Ark. Pub. Serv. Comm'n Docket No. 84-040-OII, at 2 (Mar. 12, 1984).

On August 1, 1984, the APSC ordered AP&L to appear and "show cause why all contracts and agreements made by it with

respect to any obligations to purchase power from or to pay for construction and operation costs of the Grand Gulf project should not be held to be void ab initio as a matter of law." Arkansas Power & Light Co., Ark. Pub. Serv. Comm'n Docket No. 84-190-U, at 6 (Aug. 1, 1984). The APSC had already concluded that thirty-six such agreements constituted prima facie violations of Arkansas law requiring APSC approval of certain transactions by public utilities. Id.; see Ark. Stat. Ann. § 73-253(a)(3) (1979 Repl.) (utility must have APSC approval to "sell, acquire, lease or rent any public utility plant or property constituting an operating unit or system"); id. § 73-255 (Supp. 1983) (utility must have APSC approval to "issue stocks, bonds,

notes or other evidence of indebtedness payable at periods of more than thirty-six (36) months"). After AP&L's motion to dismiss the show cause order for lack of jurisdiction was denied, MSE filed suit in the district court to temporarily and permanently enjoin the proceedings before the APSC. AP&L intervened as a plaintiff, while the Arkansas Attorney General and Ratepayers Fight Back intervened as defendants. A hearing was held on the consolidated issues of preliminary and permanent relief. The district court found that the APSC's actions were preempted by the Federal Power Act, 16 U.S.C. §§ 824-824k (1982), and permanently enjoined APSC from conducting further proceedings on the show cause order. Regarding the need for equitable relief, the court found:

> MSE must raise an additional several billion dollars in the next few years to pay constrution and financing costs. The ability to raise these funds is dependent on the enforceability of the threatened agreements. If the actions of the APSC are not enjoined, the cost of capital to MSE will be raised to the point that the Project is jeopardized, and the ability of MSE to provide its multistate wholesale customers with power will be irreparably impaired.

Middle South Energy, Inc. v. Arkansas Public Service Commission, No. LR-C-84-778, slip op. at 5 (E.D. Ark. Sept. 14, 1984).[11]

The APSC, the Arkansas Attorney General, and Ratepayers filed an appeal with this court.[12] After the case was

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[11]The SEC noted recently that delaying commercial operation of the reactor would increase costs by about $28 million per month, primarily in finance charges. Middle South Utilities, Public Utility Holding Co. Act Rel. No. 23,579 at 9 (Jan. 23, 1985).

[12]Arkansas Electric Energy

argued, FERC affirmed the order of the ALJ allocating AP&L 36% of the Grand Gulf capacity. Middle South Energy, 31 F.E.R.C. ¶ 61,305 (1985).

I.

As an initial matter, amicus curiae on behalf of the APSC[13] asserts that MSE's suit does not "aris[e] under the Constitution [or] laws *** of the United States" as required to invoke federal question jurisdiction under 28 U.S.C. § 1331 (1982) because, pursuant to the "well-pleaded complaint" rule, the federal question must be raised necessarily as an element of the plain-

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Consumers and Reynolds Metals Company filed an amicus curiae brief, as did the Metropolitan Life Insurance Company and other holders of MSE's first mortgage bonds.

[13]We consider this issue, though not raised by a party, since subject matter jurisdiction cannot be waived or conferred by consent. Insurance Corp.

tiff's entitlement to relief and cannot merely be a response to an anticipated defense. See generally Francise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1, 7-12 (1983) (citing older cases). Specifically, amicus curiae argues that jurisdiction is lacking because MSE's preemption claim is merely a defense to the state administrative action. See id. at 15-16 (discussing Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667 (1950)). This argument ignores the recognition by the Supreme Court that "a claim of federal preemption does not always arise as a defense to a coercive action." Franchise Tax, 463 U.S. at 12 n.12; see

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of Ireland v. Compagnie des Bauxites de Guinea, 456 U.S. 694, 702 (1982); United States ex rel. Burnette v. Driving Hawk, 587 F.2d 23, 24 (8th Cir. 1978).

Aluminum Co. of America v. Utilities Commission, 713 F.2d 1024, 1028 (4th Cir. 1983), cert. denied, 104 S. Ct. 1326 (1984). The "not a defense to a state action" rule is premised on the determination that the declaratory judgment act, 28 U.S.C. § 2201 (1982), is merely procedural and that Congress thereby did not enlarge the subject matter jurisdiction of federal courts. Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 671-72 (1950). This concern is not implicated when the declaratory plaintiff has independent grounds for federal relief such as an injunction. Note, Federal Jurisdiction over Declaratory Suits Challenging State Action, 79 Colum. L. Rev. 983, 1001 (1979).[14] Thus, the district court

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[14]To deny access to federal court when, regardless of the existence of procedures for declaratory relief, an injunction would otherwise have been

available would contract the jurisdiction of the federal courts. Note, supra, at 1001. Cases that appear to have taken this route have generally relied on the Supreme Court decision of Public Serv. Comm'n v. Wycoff Co., 344 U.S. 237 (1952), which actually turned on the failure of the plaintiff to establish a ripe controversy or to identify what right it was asking the court to declare. Id. at 244-46; see Franchise Tax, 463 U.S. at 16 n. 14. Furthermore, the widely quoted Wycoff dictum suggesting that even if the controversy had been ripe, federal subject matter jurisdiction would have been lacking, is again couched solely in terms of declaratory relief, the Court having determined that the plaintiff had abandoned its request for an injunction because of the absence of proof of the threatened injury necessary to support that form of relief. 344 U.S. at 241. The Supreme Court itself has never interpreted Wycoff, as some courts of appeals have, to hold that subject matter jurisdiction does not exist any time a federal claim can be litigated as a state defense. Illinois v. General Elec. Co., 683 F.2d 206, 211 (7th Cir. 1982), cert. denied, 461 U.S. 913 (1983); Braniff Int'l v. Florida Pub. Serv. Comm'n, 576 F.2d 1100, 1104 (5th Cir. 1978). Concerns with the timing of adjudication need not distort analysis of subject matter jurisdiction but instead can be--and more appropriately are--handled through the discretion of courts in matters involving equitable relief and through doctrines such as exhaustion of administrative remedies and abstention. Note, supra, at 1001.

had subject matter jurisdiction pursuant to MSE's complaint, which on its face properly raises the federal question of whether the state proceeding should be enjoined on preemption[15] grounds.[16] Shaw v. Delta Air Lines, 463 U.S. 85, 96 n.14 (1983).

Appellants nevertheless argue that jurisdiction is lacking because there will be no "ripe" case or controversy until the APSC reaches some determination as to the validity of the contracts and the effects of that deter-

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[15]It makes no difference to subject matter jurisdiction that we ultimately choose not to decide this case on preemption grounds. Furthermore, the operation of the commerce clause in limiting state authority is sufficiently similar to preemption that we believe the same jurisdiction analysis applies.

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[16]There are no Eighth Circuit decisions to the contrary. Despite the representations of amicus curiae, three of the cases it cites stand only for the proposition that a preemption claim does

mination are felt by MSE. See Abbott

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not raise a federal question under section 1331 when, absent the availability of the declaratory judgment procedure, it would have arisen only as a defense to a state action. Neither the language nor context of these cases extends this interpretation of the well-pleaded complaint rule to foreclose injunctions sought on preemption grounds. E.g., First Fed. Sav. & Loan Ass'n v. Anderson, 681 F.2d 528 (8th Cir. 1982) (declaratory judgment only sought; no pending state proceeding to enjoin); Lawrence County v. South Dakota, 668 F.2d 27 (8th Cir. 1982) (same); First Nat'l Bank v. Aberdeen Nat'l Bank, 627 F.2d 843 (8th Cir. 1980) (en banc) (removal to federal court improper when based on ground that preemption would be raised as a defense to state tort action). The one case cited by amicus curiae in which we did find subject matter jurisdiction lacking despite a request for an injunction is distinguishable in that the panel expressly found the preemption claim there to be only in the nature of a defense to the state administrative proceeding. Home Fed. Sav. & Loan Ass'n v. Insurance Dep't, 571 F.2d 423, 427 (8th Cir. 1978). Since MSE is seeking affirmative relief from the APSC's attempts to even inquire into certain affairs relating to its business, we need not decide if the characterization of the preemption claim in Home Federal remains viable in light of Shaw.

Laboratories v. Gardner, 387 U.S. 136, 148-49 (1967). This argument again ignores the true nature of the relief sought. MSE challenges not the state's ultimate substantive decision but its authority to even conduct the contemplated proceeding. It can hardly be doubted that a controversy sufficiently concrete for judicial review exists when the proceeding sought to be enjoined is already in progress.

II.

The district court's decision on preemption grounds was based on the Federal Power Act. Congress's purpose in enacting the Act was to regulate "the transmission of electric energy in interstate commerce and *** the sale of electric energy at wholesale in

interstate commerce." 16 U.S.C. § 824(b) (1982). To accomplish this goal, Congress gave FERC the power to make "just and reasonable" any public utility "rule, regulation, practice or contract affecting [a] rate, charge, or classification [that] is unjust, unreasonable, unduly discriminatory or preferential." Id. § 824e(a) (emphasis added).

The district court held that the Availability Agreement and its amendments were "agreements for the purchase of wholesale power in interstate commerce or are so integrally related to such purchases that they are subject to the exclusive jurisdiction of the FERC." Slip op. at 7. The other agreements subject to the APSC order were found to be "essential to the interstate whole-

sale sale of power and therefore *** not subject to state jurisdiction." Id. We read the district court's order as finding preemption on the ground that the threatened actions of the APSC would block the accomplishment of the purpose behind the Federal Power Act. See Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

Essentially, the APSC is trying to secure for Arkansas the zero allocation embodied in the UPSA. Such a result would be contrary to the 36% allocation recently approved by FERC in regulating the wholesale aspects of the Grand Gulf project. Thus, a strong argument can be made that the APSC's powers have been preempted by the Federal Power Act. The appellants, on the other hand, urge that we examine the APSC's powers in light of other federal legislation, the Public

Utility Holding Company Act of 1935. This law, they argue, expressly reserves to the states some jurisdiction to regulate the securities dealings of utility holding companies and their subsidiaries. See 15 U.S.C. §§ 79f(b), 79g(g), 79u (1982); infra at 17-20; supra notes 3 & 5.

The district court's order did not squarely deal with the argument now made by appellants. We are not convinced that the district court improperly based its decision on preemption grounds. Nevertheless, we choose not to address the difficult question of whether the authority denied the states under the Federal Power Act may be granted to them by the Holding Company Act, because the case can be disposed of under well-settled commerce clause principles. See

New England Power Co. v. New Hampshire, 455 U.S. 331, 334 n.10 (1983) (deferring resolution of preemption issues in favor of commerce grounds).

III.

The commerce clause grants Congress the power to regulate commerce among the states. U.S. Const., art. I, § 8, cl. 3. It has long been recognized as implying limits on the powers of the states to erect barriers against interstate trade. South-Central Timber Development v. Wunnicke, 104 S. Ct. 2237, 2240 (1984); see Cooley v. Board of Wardens, 53 U.S. (12 How.) 299, 317-18 (1852). Absent conflicting federal legislation, the states may exercise police power over matters of legitimate local concern even though such regulation may affect

interstate commerce. Philadelphia v. New Jersey, 437 U.S. 617, 623-24 (1978); Raymond Motor Transporation v. Rice, 434 U.S. 429, 440 (1978). Incidental burdens on interstate commerce may be unavoidable when a state legislates to protect its citizens. Philadelphia v. New Jersey, 437 U.S. at 623-24. Nevertheless, the safeguarding of local interests must ultimately yield to the principle that "one state in its dealings may not place itself in a position of economic isolation." Baldwin v. G.A.F. Seeling, Inc., 294 U.S. 511, 527 (1935).

"[T]he regulation of utilities is one of the most important of the functions traditionally associated with the police power of the states." Arkansas Electric Cooperative Corp. v. Arkansas

Public Service Commission, 461 U.S. 375, 377 (1983). "Need for new power facilities, their economic feasibility, and rates and services, are areas that have been characteristically governed by the States." Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission, 461 U.S. 190, 205 (1983); see also Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557, 569 (1980) ("The states's concern that rates be fair and efficient represents a clear and substantial governmental interest."). At the same time, however, the "production and transmission of energy is an activity particularly likely to affect more than one state, and its effect on interstate commerce is often significant enough that

uncontrolled regulation by the States can patently interfere with broader national interests." Arkansas Electric, 461 U.S. at 377. The dispositive issue here is whether the APSC's desire to protect Arkansas' interest has resulted in an impermissible burden on interstate commerce.

IV.

The Attorney General argues that since the APSC has only issued a show cause order, and not actually voided the contracts in issue, there is no significant burden on interstate commerce. The APSC's position in the administrative proceedings surrounding Grand Gulf, however, leaves little doubt that APSC intends to substantially reduce or eliminate AP&L's participation in the pro-

ject. The threat of enforcement presented by the show cause order is sufficient to support an injunction against further proceedings.

On March 12, 1984, the APSC issued two orders instituting investigations. The first, retrospective in nature, referred to developments in FERC proceedings that "portend[ed] catastrophically enormous rates increases" for AP&L customers. Arkansas Power & Light Co., Ark. Pub. Serv. Comm'n Docket No. 84-040-0II, at 1 (Mar. 12, 1984). The second order, prospective in nature, was to

> look forward to ascertain what the ratepayers of AP&L, AP&L itself, the Commission, the Governor, and the General Assembly may do to circumvent or deflect the economic harm that looms over the State from the imminent prospect of being mandated by a federal agency tc pay for a power generating plant that is possibly neither needed or wanted by anyone in

> Arkansas, *** and that would, if forced upon the State, potentially result in such immense amounts of excess generating capacity that it could neither be used or sold by AP&L.

Arkansas Power & Light Co., Ark. Pub. Serv. Comm'n Docket No. 84-041-0II, at 2 (Mar. 12, 1984); see supra at 6.

Nearly five months later, APSC issued the show cause order that gave rise to this lawsuit. It listed thirty-six agreements relating to the Grand Gulf project, and stated: "The construction of the Grand Gulf Project was and is dependent on the[se] agreements." Arkansas Power & Light Co., Ark. Pub. Serv. Comm'n Docket No. 84-190-U, at 5 (Aug. 1, 1984). The APSC stated that its approval, required by Arkansas law, had not been given the agreements and that some or all were

"prima facie violations of Arkansas law." Id. at 6. AP&L was ordered to appear and show cause "why all contracts and agreements made by it with respect to any obligations to purchase power from or to pay for construction and operation costs of the Grand Gulf Project should not be held void ab initio as a matter of law." Id. The APSC later denied AP&L's motion to dismiss the show cause order for lack of jurisdiction based on FERC's exclusive jurisdiction over the agreements. Arkansas Power & Light Co., Ark. Pub. Serv. Comm'n Docket No. 84-190-U (Aug. 31, 1984).

The APSC argued vigorously before both FERC and the SEC for a reduction or elimination of AP&L's role in Grand Gulf. In an SEC proceeding to authorize

the sale of common stock by MSE, the APSC asked the Commission to consider the "discontinuance or moth-balling" of the Grand Gulf project. Middle South Utilities, SEC Public Utility Holding Co. Act Rel. No. 23,579 at 9 (Jan. 23, 1985). In litigation before FERC, the APSC sought to avoid the allocation of any Grand Gulf power to Arkansas, claiming that the state does not need and cannot economically use the power. Middle South Energy, 26 F.E.R.C. ¶ 63,044 (1984), aff'd, 31 F.E.R.C. ¶ 61,305 (1985).[17]

The threat posed by the show cause order is sufficient to warrant the injunction. In Pennsylvania v. West Virginia, 262 U.S. 553 (1923), two states brought suits to enjoin West

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[17]Further, after this lawsuit was filed, the following account appeared in the press: "[A]n attorney representing the Arkansas utility com-

Virginia from enforcing legislation that would have reduced out-of-state delivery of West Virginia natural gas. The Court rejected the argument that the suits were premature, finding that the gas curtailment was "presently threatened and likely to be productive of great injury." Id. at 591. In proceeding to consider the merits of the commerce clause issue, the Court observed: "One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough." Id. at 593; see also Pacific Gas & Electric Co. v.

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mission said the commission staff is confident it can defend its order against the Middle South suit. He added that "if the APSC voids AP&L's part (of Grand Gulf), the whole thing goes down the toliet." Wall St. J., Sept. 6, 1984, at 7, col. 4-5 (Plaintiff's Ex. 10).

State Energy Resources Conservation & Development Commission, 461 U.S. 190, 201 (1983) (decision on preemption of state nuclear-waste disposal law should not be delayed because postponement "would likely work substantial hardship on the utilities").

The mere possibility that a state's interpretation of its law may avoid the necessity for an injunction does not preclude federal review. In City of Chicago v. Atchison, Topeka & Santa Fe Railway, 357 U.S. 77 (1958), the Court rejected an argument in a commerce clause case that a declaratory judgment should not issue because the state courts had not been given a chance to act. Among other things, the Court reasoned that: "Remission to [state court] would involve substantial delay

and expense, and the chance of a result different from that reached below, on the issue of applicability, would appear to be slight." Id. at 84.

In this case, as in the West Virginia and Pacific Gas cases, the threatened action is likely to cause great injury, in the form of higher financing costs for MSE. Also, as in City of Chicago, the chance of a state adjudication obviating the commerce clause issue is remote. Thus, we conclude that a commerce clause violation can be found notwithstanding that the APSC has not actually voided the agreements. Cf. Northern Natural Gas Co. v. State Corporation Commission, 372 U.S. 84, 92 (1963) ("[A]lthough collision between the state and federal regulation may not be an inevitable

consequence, there lurks such imminent possibility of collision in orders purposely directed at interstate wholesale purchasers that the orders must be declared a nullity."); Public Service Commission v. Wycoff Co., 344 U.S. 237, 245 (1952) (Court refused to allow suit for declaratory relief against state commission where no "risk of suffering penalty, liability or prosecution was shown"); Natural Gas Pipeline Co. v. Slattery, 302 U.S. 300, 308-09 (1937) (declining to find a commerce clause violation in utilities commission merely seeking records, the Court noted that no action based on discovered information was alleged and that it "will be time enough to challenge such action of the commission when it is taken or at least threatened") (emphasis added) (citations omitted).

V.

We next consider appellants' argument that Congress has authorized any unconstitutional effect that the APSC's actions may have on interstate commerce. Congress may confer upon the states the ability that they would otherwise not enjoy to restrict the flow of interstate commerce. Lewis v. BT Investment Managers, 447 U.S. 27, 44 (1980); Southern Pacific Co. v. Arizona, 325 U.S. 761, 769 (1945). "But when Congress has not 'expressly stated its intent and policy' to sustain state legislation from attack under the Commerce Clause, we have no authority to rewrite its legislation based on mere speculation as to what Congress 'probably had in mind.'" New England Power Co. v. New Hampshire, 455 U.S. 331, 343

(1982) (quoting Prudential Insurance Co. v. Benjamin, 328 U.S. 408, 427 (1946); United States v. Public Utilities Commission, 345 U.S. 295, 319 (1953) (Jackson, J., concurring)). Rather, "for a state regulation to be removed from the reach of the dormant commerce clause, congressional intent must be unmistakably clear." South-Central Timber Development v. Wunnicke, 104 S. Ct. 2237, 2242 (1984).

Ratepayers urge that there has been an "explicit recognition by Congress of the authority of a state to regulate the securities of an electric utility operating within its borders." It is true that the Public Utility Holding Company Act of 1935 (HCA), 15 U.S.C. §§ 79 to 79z-6 (1982), expressly reserves some regulatory powers to the sta-

tes. Nevertheless, the provisions that Ratepayers rely upon show no congressional purpose to insulate the APSC's activity from commerce clause scrutiny.

The HCA generally requires registered companies and their subsidiaries to file declarations with the SEC that must be approved before securities may be issued or sold. 15 U.S.C. §§ 79f, 79g. Section 79f(b) exempts from the declaration requirement securities of a subsidiary company of a registered holding company, "if the issue and sale * * * are solely for the purpose of financing the business of such subsidiary company and have been expressly authorized by the State Commission of the state in which such subsidiary company is organized and

doing business." This narrow exemption obviously envisions a transaction completely different from the Grand Gulf agreements. The documents of concern to the APSC involve all the entities in the Middle South system. They implicate interstate commerce far more than the intrastate dealings between a state commission and a single subsidiary do. Thus, we find in section 79f(b) no express statement by Congress to exemp the APSC's activity from the commerce clause.

A related provision, section 79g(g), provides for state input during the SEC's consideration of proposed declarations:

> If a State commission or State securities commission having jurisdiction over any of the acts enumerated in subsection (a) of section 79f of this title, shall inform the Commission * * * that

> State laws applicable to the act in question have not been complied with, the Commission shall not permit a declaration * * * to become effective until and unless the Commission is satisfied that such compliance has been effected.

Like section 79f(b), this section contains no direction from Congress concerning immunity from the commerce clause.

These conclusions are supported by New England Power Co. v. New Hampshire, 455 U.S. 331 (1982). In New England Power, the Court considered the relationship of the commerce clause to the Federal Power Act. A state utilities commission had sought to restrict the export of hydroelectric energy generated within the state. The state claimed that this action was not invalid under the commerce clause because a section in

the Federal Power Act provided that the Act "shall not * * * deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line." Id. § 824(b). The Court interpreted this section as doing nothing more than saving from federal preemption state authority that was otherwise lawful. It concluded that section 824(b)

> is in no sense an affirmative grant of power to the states to burden interstate commerce "in a manner which would otherwise not be permissible." * * * Nothing in the legislative history or language of the statute evinces a congressional intent "to alter the limits of state power otherwise imposed by the Commerce Clause," or to modify the earlier holdings of this Court concerning the limits of state authority to restrain interstate trade. Rather, Congress' concern was simply "to define the extent of the federal legislation's pre-emptive effect on state law."

455 U.S. at 341 (citations omitted).

The provisions of the HCA discussed above are facially similar to the statute at issue in New England Power. Moreover, the Federal Power Act and the HCA have similar legislative histories. Compare New England Power, 455 U.S. at 341 ("The legislative history of the [Federal Power] Act * * * indicates that Congress intended only that its legislation 'tak[e] no authority from State commissions.'") (quoting H. R. Rep. No. 1318, 74th Cong., 1st Sess. 8 (1935)), with Alabama Electric Cooperative v. Securities & Exchange Commission, 353 F.2d 905, 907 (D.C. Cir. 1965) ("The purpose of the Public Utility Holding Company Act, as shown by its legislative history, was to supplement state regulation-- not to supplant it.").

Thus, sections 79f(b) and 79g(g) do not preclude us from finding a violation of the commerce clause here.

Ratepayers also contend that 15 U.S.C. § 79u saves any commerce clause transgression. This section provides:

> [N]or shall anything in this chapter affect the jurisdiction of any other commission, board, agency or officer of * * * any state or political subdivision of any State, over any person, security, or contract, insofar as such jurisdiction does not conflict with any provision of this chapter or any rule, regulation, or order thereunder.

In Edger v. Mite Corp., 457 U.S. 624 (1982), the Supreme Court considered whether a state tender offer statute violated the commerce clause. The federal securities laws contained a provision nearly identical to section 79u. See 15 U.S.C. § 78bb(a) (1982). There

was no suggestion made that this savings provision could authorize state violations of the commerce clause. Rather, Justice White interpreted the statute as leaving to the courts to decide whether similar state legislation may be preempted.. 457 U.S. at 631. Although Justice White did not speak for the whole Court, Mite supports a conclusion that section 79u does not insulate the APSC's actions from examination under the commerce clause.

VI.

We must next determine the appropriate level of scrutiny under the commerce clause. The Supreme Court has recently applied two tests to state restrictions on the flow of interstate power. In New England Power Co. v. New

Hampshire, 455 U.S. 331 (1982), the New Hampshire Public Utilities Commission sought to restrict the export of hydroelectric energy produced within the state. The Commission's purpose was to contain the cost savings associated with this cheaper form of electrical generation to the citizens of New Hampshire. This savings was to be obtained at the expense of customers in neighboring states that had been sharing the power produced in New Hampshire. Id. at 335-36, 339. The Supreme Court had no trouble concluding that this sort of "protectionist regulation" was forbidden by the commerce clause. Id. at 339. Two reasons were cited for reaching this result. First, the utilities commission had made clear that its order was "designed to gain an economic advantage

for New Hampshire citizens at the expense of * * * customers in neighboring states." Id. Second, the Court found indisputable that the "'exportation ban' place[d] direct and substantial burdens on transactions in interstate commerce." Id. (citing Public Utilities Commission v. Attleboro Steam & Electric Co., 273 U.S. 83 (1927)). There was no discussion of balancing the state's interest against the detriment to interstate commerce.

A different analysis was used the next year in Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission, 461 U.S. 375 (1983). At issue was an order of the APSC asserting jurisdiction over the wholesale rates charged retail distributors by a rural power cooperative. The

cooperative argued that this assertion violated the commerce clause under the test articulated in Attleboro, which invalidated regulations imposing a "direct" rather than "indirect" burden on interstate commerce. 461 U.S. at 390; see Attleboro, 273 U.S. at 90. The Court, however, decided to apply "an analysis grounded more solidly" in modern commerce clause cases: "Where [a] statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." 461 U.S. at 393-94 (quoting Pike v. Bruce Church, 397 U.S. 137, 142 (1970)). After applying this test, the Court

upheld the APSC's assertion of jurisdiction.

Thus, the Court has applied a rule of presumptive invalidity to regulations designed to further economic protectionism, and a balancing test, which if far more deferential to the states, to facially neutral regulations. See Generally Baltimore Gas & Electric Co. v. Heintz, 760 F.2d 1408, 1420-22 (4th Cir. 1985) (discussing flux in commerce clause jurisprudence). New England Power and Arkansas Electric can be harmonized under the following standard: "[W]here simple economic protectionism is effected by state legislation, a virtual per se rule of invalidity has been erected. In contrast, legislation that visits its effects equally upon interstate and local business may sur-

vive constitutional scrutiny if it is narrowly drawn." Lewis v. BT Investment Managers, 447 U.S. 27, 36 (1980). The "crucial inquiry," therefore, is whether the APSC's action "is basically a protectionist measure, or whether it can fairly be viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental." Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978). If a discriminatory purpose is found, there is no need to engage in the Bruce Church balancing approach. Bacchus Imports, Ltd. v. Dias, 104 S. Ct. 3049, 3055 (1984).

"A finding that state legislation constitutes 'economic protectionism' may be made on the basis of either discriminatory purpose or discriminatory

effect." Id. In this case, there is ample evidence of both. The APSC seeks to cancel the Grand Gulf agreements ostensibly because they have not received the necessary state regulatory approval. Its apparent concern, which has been made abundantly plain in its orders and its arguments before the SEC and FERC, however, is the economic impact on Arkansas citizens caused by AP&L's participation in Grand Gulf. It seeks to deflect what it has estimated to be rate increases of more than $3.5 billion over the next ten years.[18] Given free rein, the APSC would shift this burden to the citizens of Mississippi and Louisiana, citizens who are powerless to directly influence Arkansas' internal affairs.

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[18] See Middle South Energy, 26 F.E.R.C. at 65,097:

Because the costs of power from Grand

In New England Power, New Hampshire sought to contain within the state the benefits of low-cost power. Arkansas, conversely, seeks to close its borders to high-cost electricity. The effect of both actions is the same: a preference for citizens in the regulating jurisdiction gained at the expense of out-of-state customers. Nor can it be doubted that the APSC's action would constitute a direct and substantial burden on interstate commerce. The integrated nature of MSU and MSE, particularly the

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Gulf are perceived to be much higher than the costs of power from other sources on the MSU system, it is not surprising that each of these parties supports an allocation of power which results in the lowest allocation to the MUS operating company or companies in which the party is interested, especially during the early years of operation of Grand Gulf when the costs of Grand Gulf are higher than in later years.

Grand Gulf project, represents commerce that is interstate in a most basic form. Thus, this case is controlled by New England Power, and the APSC must be prohibited from voiding AP&L's role in the Grand Gulf project. See also Philadelphia v. New Jersey, 437 U.S. at 624 ("The clearest example of [protectionist] legislation is a law that overtly blocks the flow of interstate commerce at a state's borders.").[19]

VII.

Finally, appellants assert that the district court should have used its discretion to withhold the exercise of its powers under any of several doctrines concerned with premature federal interference with state procedings.

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[19]The APSC's reliance on Indiana & Mich. Power Co. v. Michigan, 405 Mich. 400, 275 N.W.2d 450 (1979), is

Under Burford v. Sun Oil Co., 319 U.S. 315 (1943), for example, a federal court should abstain when the action before it involves matters of state law best left to the state alone. The very premise of this doctrine, however, is lacking when, as here, federal law or Constitution makes the proceeding or regulation at issue beyond the state's authority. South Central Bell Telephone Co. v. Louisiana Public Service Commission, 744 F.2d 1107, 1123-24 (5th Cir. 1984), petition for cert. filed, 53 U.S.L.W. 3449 (U.S. Nov. 30, 1984) (No. 84-870). There is no concern with protecting a legitimate state regulatory

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misplaced, for that case did not involve state regulation with protectionist motives. See Michigan Gas Storage Co. v. Michigan Pub. Serv. Comm'n, 405 Mich. 376,275 N.W.2d 457 (1979) (companion case).

scheme, Baggett v. Department of Professional Regulation, 717 F.2d 521, 524 (11th Cir. 1983), and the question becomes one of basic federal supremacy, which does not turn on local factors or local expertise. South Central Bell, 744 F.2d at 1123.

Similarly, the rule of Younger v. Harris, 401 U.S. 37 (1971), limiting injunctions of pending state proceedings embodies the principle of our federal system that legitimate state functions be respected.[20] This "comity," however, is not strained when a federal court cuts off state proceedings that entrench upon the federal domain. Baggett, 717 F.2d at 524. The legitimate state interest contemplated by Younger, see Middlesex County Ethics Committee v.

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[20]Because of our ultimate conclusion, we may assume without deciding that the Younger doctrine, which was developed in the context of

Garden State Bar Association, 457 U.S. 423, 432 (1982), does not exist when the state action has been preempted or foreclosed by the Constitution. Champion International Corp. v. Brown, 731 F.2d 1406, 1408 (9th Cir. 1984).

Abstention under Railroad Commission v. Pullman Co., 312 U.S. 496 (1941), focuses on whether a decision by a state court might clarify state law so as to make it unnecessary to reach a constitutional issue otherwise presented. Preemption and the commerce clause, however, are matters of federal law, and there is no interpretation of

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state criminal proceedings, applies to the show cause order and proceedings contemplated by the Arkansas Public Service Commission. See generally Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 432 (1982) (discussing scope of Younger).

Arkansas law which could make it unnecessary for us to reach the question as to whether the Constitution forecloses even the mere issuance of the show cause order entered here by the APSC. See Hotel & Restaurant Employees Union Local 54 v. Danziger, 709 F.2d 815, 832 (3d Cir. 1983), vacated on the merits sub nom. Brown v. Hotel & Restaurant Employees Union Local 54, 104 S. Ct. 3179 (1984).

Finally, the doctrine of exhaustion of administrative remedies in the context of state agency proceedings simply addresses many of the same concerns which the various types of abstention are designed to reach. See 4 K. Davis, Administrative Law Treatise § 25:1, at 350 (1983); see also West v. Bergland, 611 F.2d 710, 715-17 (8th Cir. 1979)

(developing factors used in determining whether to require exhaustion), cert. denied, 449 U.S. 821 (1980).

To the degree that irreparable harm also must be shown, see West, 611 F.2d at 719-20, MSE alleges such injury in the form of loss through exhaustion of the very right--the right to be free of the state administrative proceeding--it seeks to protect. The Supreme Court recognized such a right on similar facts in Public Utilities Commission v. United Fuel Gas Co., 317 U.S. 456 (1943), when an interstate gas supplier sought to enjoin the enforcement against it of a state agency order requiring it to prove the reasonableness of the rates it charged a customer utility within that state. Although the agency had done nothing to that point but assert juris-

diction, id. at 465, the Court upheld the injunction on the ground that the supplier suffered injury from the enforcement of the order for proof itself and that the expense of complying with such orders was among the contingencies against which Congress sought to guard in creating exclusive federal jurisdiction. Id. at 469; see also Public Utilities Commission v. United States, 355 U.S. 534, 540 (1958) ("But where the only question is whether it is constitutional to fasten the administrative procedure onto the litigant, the administrative agency may be defied and judicial relief sought as the only effective way of protecting the asserted constitutional right."); Panhandle Eastern Pipe Line Co. v. Public Service Commission, 332 U.S. 507, 512 (1947)

(state agency order requiring interstate gas supplier to file certain tariffs, rules, and regulations was not just a threat to apply the state regulatory plan but constituted actual application of the plan in its initial stages); cf. Monahan v. Nebraska, 645 F.2d 592, 597 (8th Cir. 1981) (claim that state procedure itself conflicted with federal act could not be effectively addressed by exhausting state procedure).

Here the mere assertion of jurisdiction by the APSC had a negative impact on MSE's ability to obtain investors and complete its project, thus similarly interfering with the exclusive federal scheme for governing interstate power transmission and sales. And, as in United Fuel, we observe that MSE raised the preemption question before

the APSC in a motion to dismiss the show cause order for lack of jurisdiction and only filed this suit when such motion was denied. 317 U.S. at 470 (distinguishing Natural Gas Pipeline Co. v. Slattery, 302 U.S. 300 (1937)). We thus conclude that neither the failure of MSE to pursue further state remedies nor the abstention doctrines of Burford, Younger, or Pullman make the district court's resolution of this case an abuse of discretion. Nor are we convinced that the district court improperly determined the need for equitable relief or the scope of the injunction.

The judgment of the district court is affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF
APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

MIDDLE SOUTH ENERGY, INC.,

Plaintiff,

and

ARKANSAS POWER & LIGHT COMPANY,

Plaintiff-Intervenor,

V. No. LR-C-84-778

ARKANSAS PUBLIC SERVICE COMMISSION;
ROBERT E. JOHNSON, COMMISSIONER;
PATRICIA S. QUALLS, COMMISSIONER;
and JAMES W. DANIEL, COMMISSIONER,

Defendants,

and

ATTORNEY GENERAL OF ARKANSAS,

Defendant-Intervenor,

and

RATEPAYERS FIGHT BACK,

Defendant-Intervenor.

JUDGMENT

In accordance with the Court's Memorandum Opinion issued this date, defendant Arkansas Public Service Commission is permanently enjoined from conduction further proceedings in its docket No. 84-190-U.

This 14 day of September, 1984.

HENRY WOODS, U.S. District Judge

MEMORANDUM OPINION

The complaint was filed in the above-styled action on August 31, 1984 seeking issuance of an injunction which would prevent the Arkansas Public Service Commission from conducting further proceedings in Docket

No. 84-190-U. A hearing on requested temporary relief was heard together with a hearing on the merits (at the suggestion of the Arkansas Public Service Commission and by agreement of the parties) on September 7, 1984. Although all parties were given the opportunity to present evidence, Middle South Energy, Inc. was the only party that called a witness. Extensive briefs have been filed by all concerned, and the Court is now prepared to enter its findings of fact and conclusions of law.

FINDINGS OF FACT

1. The Middle South System consists of a parent holding company, Middle South Utilities, Inc. ("MSU") and various subsidiary companies wholly-

owned by MSU. MSU is a holding company registered under the Public Utility Holding Company Act of 1935. MSU's subsidiaries include, among others, four operating companies, Arkansas Power & Light Company ("AP&L"), Louisiana Power & Light Company ("LP&L"), Mississippi Power & Light Company ("MP&L"), and New Orleans Public Service, Inc. ("NOPSI") (collectively the "System Companies"), a generating company, Middle South Energy, Inc. ("MSE"), and a service company, Middle South Services, Inc. ("MSS").

2. The System Companies pool their power. Their systems are interconnected. They coordinate their plans to achieve economies of scale in the construction of units to achieve desirable levels of system reserves.

These companies buy power from each other on a more or less regular basis.

3. In early 1974, MSE was created to finance, construct and operate new base load generating projects to provide electric power and energy to the System Companies. The first such project was a nuclear-powered generating plant known as the Grand Gulf Project (the "Project"). In connection with its initial financing, MSE obtained from these companies their agreement to purchase power from the Project, provided MSE would build it and make power from the Project available to these companies.

Under this agreement (the "Availability Agreement," PX 1-A), the System Companies agreed, in consideration of MSE's undertaking to build

the Project, to pay MSE, beginning on specified dates, whether or not the two units of the Project were then operating, such amounts in addition to funds received from any other source by MSE, as would enable MSE to meet its operating expenses, including interest on debt and depreciation of its investment in the plant at a specified rate. Any payments to be made thereunder by the System Companies would reduce the cost of their future power purchases.

4. The Availability Agreement initially provided that the share of power taken by each System Company from the Project would have varied from time to time relative to the respective needs of each System Company. (PX 1-A) In 1981 the Availability Agreement was amended

(PX 1-C) to fix the allocations of power from the Project to the System Companies in specific percentages rather than the variable allocations contemplated by the original Availability Agreement. These fixed percentages were: AP&L - 17.1%, LP&L - 26.9%, MP&L - 31.3%, and NOPSI - 24.7%. In 1980 South Mississippi Electric Power Association, Inc. agreed to acquire 10% of the Project. All percentage allocations herein refer to percentages of MSE's 90% undivided ownership interest.

5. Later in 1981 the System Companies entered into a Reallocation Agreement (PX 1-E) under which the System Companies agreed to purchase power from the Project in the following percentages:

	Unit No. 1	Unit No. 2
AP&L	0	0
LP&L	38.57	26.23
MP&L	31.63	43.97
NOPSI	29.80	29.80

6. Since MSE's rights under the Availability Agreement had been assigned by it to various financial institutions in connection with the financing of the Project, MSE's creditors would not permit MSE to change the specified percentage allocations in the Availability Agreement to conform with the Reallocation Agreement.

7. The Availability Agreement has been essential to the financing of the Project. Pursuant to a series of ten agreements entered into between 1977 and 1984, MSE has assigned its rights in the

Availability Agreement to secure indebtedness aggregating in excess of $2.5 billion to finance the construction of the Project.

8. In 1982, Unit No. 1 was nearing completion. Pursuant to the requirements of the revised Availability Agreement, MSE entered into an agreement for the sale of power from the Project. (PX 1-F) This agreement, the Unit Power Sales Agreement ("UPSA"), required each System Company to purchase the shares of power specified in the Reallocation Agreement. A&L signed the UPSA but, in accordance with the terms of the Reallocation Agreement, did not agree to purchase any power from the Project. The UPSA was filed with the FERC in June of 1982, for approval as a wholesale

power sales agreement in Docket No. ER82-616-000. The defendants ("APSC") have intervened in and are actively participating in the FERC proceeding relating to the UPSA.

9. In February of 1984, the FERC Administrative Law Judge ("ALJ") approved, after extensive briefing and oral argument, the cost-of-service rate formula with respect to Unit No. 1 as proposed in the UPSA in most material respects. (PX 2) A decision with respect to Unit No. 2 was deferred pending completion of the unit. In his decision, the ALJ did not accept the original allocation contained in the UPSA and has determined a different allocation under which the System Companies would be obligated to purchase

power from Unit No. 1 in the following proportions:

AP&L - 36%

LP&L - 14%

MP&L - 33%

NOPSI - 17%

10. On August 1, 1984, the APSC issued its Order to appear and show cause in Docket No. 84-190-U ("August Order") which directed AP&L to appear and:

> to show cause why all contracts and agreements made by it with respect to any obligations to purchase power from or to pay for construction and operation costs of the Grand Gulf Project should not be held to be void ab initio as a matter of law. (PX 9)

11. MSE has heavy financing needs at the present time, and over the next few years, to complete Unit No. 1, to refinance maturing long and short term indebtedness and to resume full construction of Unit No. 2. To complete Unit No. 1 MSE must raise approximately $200 million in capital. Debt maturities and sinking fund obligations over the next five years are as follows: 1985, $196.2 million; 1986, $1,738.2 million; 1987, $146.2 million; 1988, $196.2 million; and 1989, $162 million: and MSE's share of Unit No. 2 is presently projected to cost in excess of $3.4 billion ($779 million of which has been invested by MSE in that Unit as of July 31, 1984). (PX 1)

CONCLUSIONS OF LAW

1. In 1935 Congress passed the Federal Power Act, 16 U.S.C. §§ 824 et seq., vesting FERC (then the FPC) with jurisdiction which extends to:

> ...the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce. § 201(b)(1)

In enacting the Federal Power Act, Congress intended to vest exclusive jurisdiction in the FERC (formerly FPC) to regulate interstate wholesale utility rates. FPC v. Southern California Edison Co., 376 U.S. 205 (1964).

2. In the Federal Power Act, Congress defined electric power transmitted in interstate commerce as power which is "transmitted from a State and consumed at any point outside

thereof," [§ 824(c)] and wholesale sale as a sale "to any person for reslae" [§ 824(d)]. All matters other than the transmission and wholesale sale of electricity in interstate commerce are left to state regulation [§ 824(a) and (b)].

3. This Circuit has recognized that it is often difficult to draw the distinction between interstate and intrastate power sales. In an integrated system of power production, such as MSU's, this distinction is particularly difficult. Arkansas Power & Light Company v. Federal Power Commission, 368 F.2d 376 (8th Cir. 1966). In this case the subject agreements are inextricably bound to the wholesale sale of power in interstate

commerce, and this court cannot accept the fine line of distinction which defendants seek to draw. The Court of Appeals recently reached a similar conclusion in State of Minnesota, et al v. Federal Regulatory Commission, et al, No. 83-1745 (May 15, 1984), and this decision compels the conclusion I reach today. See also, Southwestern Bell Telephone Company v. Arkansas Public Service Commission, et al, No. 84-1488 (8th Cir. June 7, 1984).

4. The Availability Agreement and amendments thereto are agreements for the purchase of wholesale power in interstate commerce or are so integrally related to such purchases that they are subject to the exclusive jurisdiction of the FERC. The other documents which the

APSC seek to review and regulate are essential to the interstate wholesale sale of power and therefore are not subject to state jurisdiction.

5. MSE must raise an additional several billion dollars in the next few years to pay construction and financing costs. The ability to raise these funds is dependent on the enforceability of the threatened agreements. If the actions of the APSC are not enjoined, the cost of capital to MSE will be raised to the point that the Project is jeopardized, and the ability of MSE to provide its multi-state wholesale customers with power will be irreparably impaired. Moreover, such actions make future cooperation among the other states for the benefit of the entire Middle South System a virtual impossibility.

6. Plaintiff and Plaintiff-Intervenor are entitled to a permanent injunction prohibiting the Arkansas Public Service Commission from continuing its proceedings in APSC Docket No. 84 -190-U.

This 14 day of September, 1984.

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HENRY WOODS, U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

MIDDLE SOUTH ENERGY, INC.,

Plaintiff,

and

ARKANSAS POWER & LIGHT COMPANY,

Plaintiff-Intervenor,

V. No. LR-C-84-778

ARKANSAS PUBLIC SERVICE COMMISSION;
ROBERT E. JOHNSON, COMMISSIONER;
PATRICIA S. QUALLS, COMMISSIONER;
and JAMES W. DANIEL, COMMISSIONER,

Defendants,

and

ATTORNEY GENERAL OF ARKANSAS,

Defendant-Intervenor,

and

RATEPAYERS FIGHT BACK,

Defendant-Intervenor.

ORDER

Defendant Arkansas Public Service Commission seeks amendment of the Court's September 14, 1984 judgment and deletion of paragraph 4 from the Conclusions of Law supporting such judgment. In support of its position, the Arkansas Public Service Commission submits the affidavit of Dr. Keith Berry and Mr. Stephen Berkowitz (although Mr. Berkowitz did not actually sign the affidavit). Plaintiff and Plaintiff-Intervenor have moved to strike this affidavit since (1) one of the affiants is not a signatory, (2) Rule 59 of the Fed.R.Civ.P. does not provide for the submission of affidavits, and (3) they would be denied their right to cross-examine these affiants

that could have been called at the hearing of this matter. While the Court is inclined to agree with the arguments offered in support of the motion to strike, a review of the challenged affidavit reflects that it basically restates the position of the Arkansas Public Service Commission throughout these proceedings and inclusion of this affidavit in the record should not prejudice Plaintiff and Plaintiff-Intervenor.

The Court has reviewed its Findings of Fact and Conclusions of Law in light of the affidavit of Dr. Keith Berry and Mr. Stephen Berkowitz filed in support of defendant's motion and declines to alter or amend the judgment or paragraph 4 of the Conclusions of Law. The record in this case to date, as specifically

found by this court in its Findings of Fact, supports the Conclusion reached in paragraph 4, which the Arkansas Public Service Commission has challenged, and therefore the motion to amend judgment is denied.

Also pending before the Court is the Arkansas Public Service Commission's motion to stay enforcement of the injunction pending appeal. In this motion the Arkansas Public Service Commission merely restates many of the arguments it made in resisting the entry of an injunction. The maintenance of the status quo, which the Arkansas Public Service Commission suggests would be attained by entry of a stay, would have the effect of circumventing the injunction which this court has entered.

The testimony at the hearing of this matter demonstrated that the plaintiff faced a very real threat of irreparable harm in its financing efforts of the nuclear project at issue if the Arkansas Public Service Commission continued with proceedings in its Docket No. 84-190-U. Plaintiff prevailed before this court in attaining the entry of an injunction, and in light of the recent cases cited in this court's September 14, 1984 Order, the plaintiff will likely prevail on an appeal of this matter. Although there is substantial public appeal for the position taken by the Arkansas Public Service Commission, the considerations of the public interest do not tip the equities in favor of a stay of this court's injunction. To the

contrary, a stay of the injunction (as with no entry of an injunction) would have the likely effect of escalating the cost of the Grand Gulf project through increases in the financing of the project to the ultimate detriment of the consuming public.

The Court therefore finds that the equities do not favor the entry of a stay of its September 14, 1984 injunction, and the Arkansas Public Service Commission's motion seeking the same is denied.

This 11 day of October, 1984.

HENRY WOODS, U.S. District Judge

ARKANSAS
PUBLIC SERVICE COMMISSION

IN THE MATTER OF AN ORDER FOR ARKANSAS POWER & LIGHT COMPANY TO APPEAR AND SHOW CAUSE WHY CERTAIN AGREEMENTS SHOULD NOT BE HELD TO BE VOID AB INITIO	DOCKET NO. 84-190-U ORDER NO.

ORDER TO APPEAR AND SHOW CAUSE

By Ark. Stat. Ann. § 73-202 (Repl. 1979), this Commission is given the duty to supervise and regulate every public utility (as defined in Act 324 of 1935) and to do everything necessary or expedient in the exercise of that duty. Pursuant to Rule 10 of the Commission's Rules of Practice and Procedure and in the course of its duty to supervise and

regulate the public utilities of this State, the Commission issues this Order to Appear and Show Cause to Arkansas Power & Light Company (AP&L).

It has come to the attention of the Commission that Arkansas Power & Light Company (AP&L) has, over the course of the past several years, entered into or has been otherwise involved in a series of agreements purporting to establish rights, obligations, and/or duties for AP&L with respect to a portion of the investment and operating costs of the Grand Gulf Nuclear Generating Units I and II (the Grand Gulf Project) located near port Gibson, Mississippi. In addition, purported rights, duties, and responsibilities of AP&L with respect to Grand Gulf have arguably been unlawfully

impacted by certain agreements among other parties, including: Middle South Utilities, Inc. (MSU); Middle South Energy, Inc. (MSEI); Arkansas-Missouri Power Company (Ark-Mo); Louisiana Power & Light Company (LP&L); Mississippi Power & Light Company (MP&L); and New Orleans Public Service, Inc. (NOPSI); and various financial institutions.

1. Those agreements include, but are not necessarily limited to the following contracts, each of which is incorporated by express reference as if set out fully herein word by word.

A. The Availability Agreement of June 21, 1974 between MSEI, AP&L, Ark-Mo, LP&L, MP&L, and NOPSI wherein AP&L agreed to purchase power from the Grand Gulf Units and to make certain

payments to MSEI pursuant thereto (according to the capability equalization formula under the 1973 System Agreement), whether or not the units ever become operational or produce power at any time.

B. The Bank Loan Agreement of June 21, 1974, wherein certain banks severally agreed to make loans to MSEI in an aggregate amount up to $308,500,000 in order to finance the design and construction of the Grand Gulf Project.

C. The Capital Funds Agreement of June 21, 1974, between MSU and MSEI which provides that MSU will purchase from MSEI 40,000 shares of the common stock of MSEI and that MSEI will complete construction of the Grand Gulf

Project and provide power to the operating companies pursuant to the Availability Agreement of June 21, 1974, and the Systems Agreement of April 16, 1973.

D. The First Amendment of Bank Loan Agreement of December 29, 1975, wherein the aggregate amount of loans available to MSEI under the Bank Loan Agreement was increased to $353,500,000.

E. The Second Amendment of Bank Loan Agreement of August 5, 1976, wherein the aggregate amount of loans available to MSEI under the Bank Loan Agreement was increased to $465,000,000.

F. Mortgage and Deed of Trust dated as of June 15, 1977, (Original Indenture) between MSEI, United States

Trust Company of New York, and Malcolm J. Hood, Trustee.

G. First Supplemental Indenture dated as of June 15, 1977.

H. The First Amendment to the Availability Agreement of June 30, 1977, wherein commencement of commercial operation of Unit No. 2 of the Grand Gulf Project was deferred to a date not later than December 31, 1986.

I. The Amended and Restated Bank Loan Agreement of June 30, 1977, under which certain banks made loans to MSEI in the aggregate principal amount of $565,000,000.

J. The First Assignment of Availability Agreement, Consent and Agreement dated June 30, 1977, wherein MSEI assigned to the agent of certain

banks, for the benefit of said banks, as collateral security for the above loans, various rights of MSEI under the Availability Agreement.

K. The first Supplementary Capital Funds Agreement and Assignment of June 30, 1977, wherein MSU and MSEI supplemented their undertakings under the original Capital Funds Agreement.

L. The Second Supplementary Capital Funds Agreement and Assignment of June 30, 1977.

M. The Third Supplementary Capital Funds Agreement and Assignment of January 1, 1980.

N. Second Supplemental Indenture dated as of January 1, 1980.

O. The First Amendment to Amended and Restated Bank Loan Agreement

dated as of March 20, 1980, which increased to $800,000,000 the amount of the loans to be made by said banks to MSEI.

P. The Fourth Assignment of Availability Agreement, Consent and Agreement dated March 20, 1980, wherein MSEI's same rights, benefits, terms and conditions under the original Availability Agreement were further assigned as collateral security for the loans made under the Amended and Restated Agreement as amended by the First Bank Loan Amendment.

Q. The Fourth Supplementary Capital Funds Agreement and Assignment of March 20, 1980, wherein MSU and MSEI further supplemented their undertakings under the Capital Funds Agreement for

the U. S. Bank Agent and the banks under the Amended and Restated Agreement as amended by the First Bank Loan Amendment.

R. The Second Amendment to the Availability Agreement dated June 15, 1981, which allocates 17.1% of the Grand Gulf Project to AP&L and obligates AP&L to make payments to MSEI based on this allocation.

S. The Second Amended and Restated Bank Loan Agreement of June 15, 1981, which provided for the making of revolving credit loans by the banks to MSEI from time to time in an aggregate amount not in excess of $1,311,000,000 at any one time outstanding.

T. The Fifth Assignment of Availability Agreement, Consent and

Agreement dated June 15, 1981, wherein MSEI assigned to the agent of certain banks, for the benefits of said banks, in order to create a security interest for loans made under the Second Amended and Restated Agreement in favor of the agent on behalf of the banks, all of MSEI's rights to receive all monies paid or to be paid to the MSEI pursuant to Section 4 of the Availability Agreement.

U. The Fifth Supplementary Capital Funds Agreement and Assignment of June 15, 1981, wherein MSU and MSEI further supplemented their undertakings under the Capital Funds Agreement for the U. S. Bank Agent and the banks under the Second Amended and Restated Agreement.

V. The Power Purchase Advance Payments Agreement of June 15, 1981, between MSEI and AP&L, LP&L, MP&L, and NOPSI which provides that if Grand Gulf I has not been completed by December 31, 1983, the MSU operating companies must begin payments, in accordance with a fixed percentage rate, to MSEI on January 2, 1984, for power to be delivered from Grand Gulf I.

W. Third Supplemental Indenture dated as of June 15, 1981.

X. The Loan Agreement of February 5, 1982, in which the aggregate amount of loans available to MSEI from certain foreign banks is $315,000,000 at any one time until the "Term Date: which shall be the earlier of (1) December 31, 1983, or (2) the date on which

the first until (sic) of the project is placed in commercial operation.

Y. First Amendment of the Second Amended and Restated Bank Loan Agreement of February 5, 1982.

Z. The Sixth Supplementary Capital Funds Agreement and Assignment of February 5, 1982.

AA. The Sixth Assignment of Availability Agreement, Consent and Agreement of February 5, 1982, which provides for the assignment by MSEI of MSEI's rights under the Availability Agreement to the agent of the banks.

BB. First Amendment of Foreign Bank Loan Agreement dated February 18, 1983.

CC. Second Amendment of the Second Amended and Restated Bank Loan Agreement of June 30, 1983.

DD. Second Amendment of Foreign Bank Loan Agreement dated December 30, 1983.

EE. Third Amendment of Second Amended and Restated Bank Loan Agreement dated December 30, 1983.

FF. Fourth Supplemental Indenture dated as of June 1, 1984.

GG. Third Amendment of Foreign Bank Loan Agreement dated June 28, 1984.

HH. Fourth Amendment of Second Amended and Restated Bank Loan Agreement dated June 28, 1984.

II. Third Amendment of the Availability Agreement dated June 28, 1984.

JJ. First Amendment of the Power Purchase Advance Payment Agreement dated June 28, 1984.

2. The construction of the Grand Gulf Project was and is dependent on the agreements enumerated above. Those agreements obligate MSEI to repay the bank loans that finance the construction of the generating plants. Additionally, those agreements obligate AP&L, LP&L, MP&L and NOPSI to pay MSEI for the construction and finance costs of the Grand Gulf Project. Under the agreements and various amendments thereto and assignments thereof, if MSEI defaults on its obligations, the banks possess all the rights of MSEI to receive payment directly from the four operating subsidiaries of MSU, including AP&L.

3. Pursuant to Ark. Stat. Ann. § 73-253 (Repl. 1979), a public utility

may not "sell, acquire, lease or rent any public utility plant or property constituting an operating unit or system" without the consent and approval of the APSC. Further, any such transaction made without APSC approval shall be void.

4. AP&L has never sought nor received the consent and approval of the APSC for the agreements purporting to obligate it to lease a fixed share of the Grand Gulf Project. When it entered into such agreements, AP&L may, therefore, have violated the provisions of Ark. Stat. Ann. § 73-253 (Repl. 1979).

5. Pursuant to Ark. Stat. Ann. § 73-255 (1983 Cum. Supp. to Repl. 1979), a public utility may not "...issue stock, bonds, notes or other

evidence of indebtedness payable at periods or more than thirty-six (36) months ..." without authorization from the APSC.

6. The agreements entered into by AP&L obligating it to assume a fixed share of the indebtedness of MSEI or the costs of the Grand Gulf Project may constitute evidence of indebtedness under Ark. Stat. Ann. § 73-255, which provides further that any such indebtedness issued without APSC authorization shall be void.

7. AP&L has never sought nor received the authorization of the APSC to assume any share of the indebtedness of MSEI for the costs of the Grand Gulf Project; when it entered into such contractual agreements, therefore, AP&L

may have violated the provisions of Ark. Stat. Ann. § 73-255 and § 73-238.

8. After reviewing the above-noted documents and after hearing testimony in APSC Docket No. 84-040-011, this Commission concludes that the obligations purportedly imposed upon AP&L by some or all of the above agreements constitute prima facie violations of Ark. Stat. Ann. §§ 73-238, 253, and 255 (Repl. 1979). On its face and as a whole, the entry of AP&L and other parties into the agreements noted above indicate an intent to violate the Arkansas statutes designed to provide protection to the ratepayers of a public utility from that utility's intemperate decisions and unlawful actions.

IT IS, THEREFORE, ORDERED THAT:

Arkansas Power & Light Company is directed to appear before this Commission at a hearing scheduled for Friday, August 31, 1984, at 9:00 A.M., in the Hearing Room of the Commission, First Floor, 1000 Center, Little Rock, Arkansas, to show cause why all contracts and agreements made by it with respect to any obligations to purchase power from or to pay for construction and operation costs of the Grand Gulf Project should not be held to be void ab initio as a matter of law.

Pursuant to Ark. Stat. Ann. §73-237 (Repl. 1979), the burden of proof in this proceeding shall be upon AP&L, as the party seeking to avoid compliance with the provisions of Act 234 of 1935

and amendments thereto. If AP&L fails to meet its burden of proof in this proceeding, the Commission will take such actions as are necessary and permissible under Ark. Stat. Ann. § 73-238 (Repl. 1979) to ensure that AP&L is released from any obligations or duties imposed by contracts found to be void and that its ratepayers are shielded from any liability on account of its unlawful contractual arrangements.

BY ORDER OF THE COMMISSION

This 1st day of August, 1984.

Dr. Robert E. Johnston,

Chairman

James W. Daniel, Commissioner

Patricia S. Qualls,

Commissioner

1. U. S. Const., Ark. I, § 8, cl. 3.

> Powers of congress. [1.] The congress shall have power
>
> 3. To regulate commerce with foreign nations, and among the several states, and with the Indian tribes.

2. Federal Power Act, 16 U.S.C. §§ 824(a) & (b), 824c(f), 824d(a), and 825q.

> § 824(a) It is declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this subchapter and subchapter III of this chapter and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

§ 824(b). The provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

§ 824c(f). The provisions of this section shall not extend to a public utility organized and operating in a State under the laws of which its security issues are regulated by a State commission.

§ 824d(a). Rates and charges; schedules; suspension of new rates. (a) All rates and charges made, demanded, or received by any public

utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonalbe is hereby declared to be unlawful.

§ 825q. Conflict of jurisdiction.

If, with respect to the issue, sale, or guaranty of a security, or assumption of obligation or liability in respect of a security, the method of keeping accounts, the filing of reports, or the acquisition or disposition of any security, capital assets, facilities, or any other subject matter, any person is subject both to a requirement of sections 79 to 79z-6 of Title 15 or of a rule, regulation, or order thereunder and to a requirement of this chapter or of a rule, regulation, or order thereunder, the requirement of sections 79 to 79z-6 of Title 15 shall apply to such person, and such person shall not be subject to the requirement of this chapter, or of any rule, regulation, or order thereunder, with respect to the same subject matter, unless the Securities and Exchange Commission has exempted such person from such requirement of sections 79 to 79z-6 of Title 15, in which case the

requirements of this chapter shall apply to such person.

3. Public Utility Holding Company Act, 15 U.S.C. §§ 79a(b)(1), 79a(c), 79b(a)(16), 79d(a) and (b), 79g(a), (b) & (g), and 79u.

§ 79a. Necessity for control of holding companies.

(b) Upon the basis of facts disclosed by the reports of the Federal Trade Commission made pursuant to S.Res. 83 (Seventieth Congress, first session), the reports of the Committee on Interstate and Foreign Commerce, House of Representatives, made pursuant to H.Res. 59 (Seventy-second Congress, first session) and H.J.Res. 572 (Seventy-second Congress, second session) and otherwise disclosed and ascertained, it is declared that the national public interest, the interest of investors in the securities of holding companies and their subsidiary companies and affiliates, and the interest of consumers of electric energy and natural and manufactured gas, are or may be adversely affected --

(1) when such investors cannot obtain the information necessary to appraise the financial position or earning power of the issuers, because of the absence of uniform standard accounts; when such securities are issued without the approval or consent of the States having jurisdiction over subsidiary public-utility companies; . . .

(c) When abuses of the character above enumerated become persistent and wide-spread the holding company becomes an agency which unless regulated, is injurious to investors, consumers, and the general public; and it is declared to be the policy of this chapter, in accordance with which policy all the provisions of this chapter shall be interpreted, to meet the problems and eliminate the evils as enumerated in this section, connected with public-utility holding companies which are engaged in interstate commerce or in activities which directly affect or burden interstate commerce; and for the purpose of effectuating such policy to compel the simplification of public-utility holding-company systems and the elimination therefrom of properties detrimental to the proper functioning of such systems, and to provide as soon as practicable for the elimination of public-utility holding companies except as otherwise expressly provided in this chapter.

§ 79b(a)(16). "Security" means any note, draft, stock, treasury stock, bond, debenture, certificate of interest or participation in any profit-sharing agreement or in any oil, gas, other mineral royalty or lease, any collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, receiver's or trustee's certificate, or, in general, any instrument commonly known as a "security"; or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guaranty of, assumption of liability on, or warrant or right to subscribe to or purchase, any of the foregoing.

§ 79f(a). Except in accordance with a declaration effective under section 79g of this title and with the order under such section permitting such declaration to become effective, it shall be unlawful for any registered holding company or subsidiary company thereof, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, directly or indirectly (1) to issue or sell any security of such company; or (2) to exercise any privilege or right to alter the priorities, preferences, voting power, or other rights of

the holders of an outstanding security of such company.

(b)... The Commission by rules and regulations or order, subject to such terms and conditions as it deems appropriate in the public interest or for the protection of investors or consumers, shall exempt from the provisions of subsection (a) of this section the issue or sale of any security by any subsidiary company of a registered holding company, if the issue and sale of such security are solely for the purpose of financing the business of such subsidiary company and have been expressly authorized by the State commission of the State in which such subsidiary company is organized and doing business.

§ 79g. Declarations by registered companies in respect to security transactions.

(a) A registered holding company or subsidiary company thereof may file a declaration with the Commission, regarding any of the acts enumerated in subsection (a) of section 79f of this title, in such form as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for protection

of investors or consumers. Such declaration shall include

. . .

(b) A declaration filed under this section shall become effective within such reasonable period of time after the filing thereof as the commission shall fix by rules and regulations or order, unless the commission prior to the expiration of such period shall have issued an order to the declarant to show cause why such declaration sould become effective. Within a reasonable time after an opportunity for hearing upon an order to show cause under this subsection, unless the declarant shall withdraw its declaration, the Commission shall enter an order either permitting such declaration to become effective as filed or amended, or refusing to permit such declaration to become effective. Amendments to a declaration may be made upon such terms and conditions as the Commission may prescribe.

(g) If a State commission or State securities commission, having jurisdiction over any of the acts enumerated in subsection (a) of section 79f of this title, shall inform the Commission, upon request by the Commission for an opinion or otherwise, that State laws applicable to the act in question have not been complied with, the

Commission shall not permit a declaration regarding the act in question to become effective until and unless the Commission is satisfied that such compliance has been effected.

§ 79u. Effect on other laws.

Nothing in this chapter shall affect (1) the jurisdiction of the Commission under the Securities Act of 1933, as amended, or the Securities Exchange Act of 1934 over any person, security, or contract, or (2) the rights, obligations, duties, or liabilities of any person under such Acts; nor shall anything in this chapter affect the jurisdiction of any other commission, board, agency, or officer of the United States or of any State or political subdivision of any State, over any person, security, or contract, insofar as such jurisdiction does not conflict with any provision of this chapter or any rule, regulation, or order thereunder.

4. Arkansas Statutes Annotated

§§ 73-238, 73-254, and 73-255.

73-238. Contracts in violation of act void - Cancelation and recoupment. - Any contract made in violation of this Act, or any lawful order of the Department [Commission], shall be void and subject to cancelation and recoupment by action in any court of competent jurisdiction. Where a contract is made contrary to the provisions of this Act, or any lawful order of the Department [Commission], the Department [Commission] may, after notice and hearing, order the public utility to take steps within ten [10] days to recover the funds, or assets thus illegally loaned or transferred, by action in a court of competent jurisdiction, or to take such other proceedings as may be effective to release the public utility from any such contract.

73-254. Issuance of stocks and bonds and creation of liens under supervision of commission. - The power of public utilities to issue stocks, stock certificates, bonds, notes and other evidences of indebtedness, in case of public utilities incorporated under the laws of this state, and to create liens on property in this state, in case of public utilities incorporated under the laws of any state or foreign

country, is a special privilege, the right of supervision, regulation, restriction and control of which is, and shall continue to be vested in the state, and such power shall be exercised as provided by law and under such rules and regulations as the Department [Commission] may prescribe.

73-255. Stock or evidence of indebtedness issued under authority of commission - Amount of issue and application of proceeds fixed - Exception - Limitation on amount of issue - Accounting for proceeds. - A public utility may, when authorized by order of the Commission, and not otherwise, issue stock, bonds, notes or other evidence of indebtedness payable at periods of more than thirty-six [36] months after the date thereof when necessary for the acquisition of property, the construction, extension or improvement of its facilities or the improvement of its service, or for the discharge of lawful refunding of its obligations, or reimbursement of moneys actually expended from the income from any source, or for any of such purposes. The order of the Commission shall fix the amount of any such issue and the purposes to which it or its proceeds are to be applied. No such public utility shall, without the consent of the Commission, apply any such issue or its proceeds to any purpose not

specified in the order. Such public utility may issue notes for proper corporate purposes and not in violation of any provision of this Act, or of any other act, payable at periods of not more than thirty-six (36) months, without the consent of the Commission; but no such note, in whole or in part, shall be refunded by any issue of stock or bonds or by any evidence of indebtedness, with maturity date later than thirty-six (36) months from date of issue, without the consent of the Commission.

The Commission shall have no power to authorize the issuance of stocks, notes, bonds or other evidences of indebtedness of any public utility in aggregate amount at any time exceeding the fair value of the properties of the issuer and the reasonable cost of the issuance and sale of such issues. The Commission shall have power to require every public utility, other than municipalities, to account for the disposition of the proceeds of all sales of stocks, bonds, notes or other evidences of indebtedness, in such form and detail as it may deem advisable, and to establish such rules and regulations as it may deem necessary to insure the disposition of such proceeds for the purpose specified in its order.

No provision of this Act, and no deed or act done or performed under or in connection therewith shall be

construed to obligate the State of Arkansas to pay or guarantee, in any manner whatsoever, any stock, bond, note or other evidence of indebtedness, authorized, issued or executed under the provisions of this Act.

All securities issued without the approval of the Commission shall be void.